NO. 86-5542

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

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SUPREME COURT, U.S.

RONALD WOODS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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QUESTIONS PRESENTED

FIRST QUESTION

WHETHER THE PRESENCE OF 45 PRISON EMPLOYEES IN THE SPECTATOR PORTION OF THE COURTROOM, WHICH WAS ONE HALF OF THE TOTAL NUMBER OF SPECTATORS, WAS SO INHERENTLY PREJUDICIAL THAT IT DENIED WOODS A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE WOODS WAS CHARGED WITH MURDERING A PRISON GUARD AND ATTEMPTING TO MURDER THREE OTHER PRISON GUARDS.

SECOND QUESTION

WHETHER THE TRIAL COURT ERRED IN DENYING WOODS' MOTION FOR MISTRIAL BECAUSE THE PROSECUTOR PEREMPTORILY EXCUSED BLACK PROSPECTIVE JURORS SOLELY BASED UPON THEIR RACE IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

THIRD QUESTION

WHETHER THE COURT ERRED IN SENTENCING WOODS TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Woods v. State, 490 So.2d 24 (Fla. 1986) is set forth in Appendix A. A motion for rehearing and its denial are set forth in Appendix B.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered on April 24, 1986, and petitioner's timely motion for rehearing was denied on July 18, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved the constitutionality of one trial court ruling regarding the presence of a large number of spectators at Wood's trial for the murder of a prison guard who were themselves prison employees and who attended the trial in uniform. This involves the interpretation and application of the Fourteenth Amendement to the United States Constitution. Holbrook v. Flynn, 475 U.S. ___ 89 L.Ed.2d 525 106 S.Ct. ___ (1986).

This case also involves the constitutionality of two Florida Supreme Court rulings. The first deals with the prosecutor's use of peremptory challenges and involves the equal protection clause of the Fourteenth Amendment of the United States Constitution. Battson v. Kentucky, 476 U.S. ___ 90 L.Ed.2d 69, 106 S.Ct. ___ (1986).

The second issue involves the constitutionality under the Eigth Amendment of the Florida State Supreme Court willingness to uphold the trial court's imposition of Wood's death sentence. Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976).

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Union County on June 7, 1983, charged Leonard Bean and Ronald Woods with one count of first degree murder, three counts of attempted first degree murder and one count each of possession of contraband

in a state correctional institution (R 1-6).

Both men pled not guilty to the charges (R 11-12) and filed several pretrial motions. Of particular significance to this appeal, they filed the following motions:

1. Motion for individual voir and sequestration of jurors during voir dire (R 64). Denied (R 784).

2. Motion to exclude certain prospective jurors (correctional officers, their spouses, and relatives) (R 70). Granted in part (R 435).

3. Motion for change of venue (R 425). Denied.

4. Motion to continue (R 47). Denied (R 814).

Bean and Woods proceeded to trial on September 26, 1983, before Judge R.A. Green. Woods was found guilty of the crimes charged, and Bean was found guilty of the murder and possession charges and one count of attempted murder (R 592-597).

Accordingly, Bean and Woods proceeded to the sentencing phase of the trial, and after hearing the evidence, argument, and instructions, the jury recommended by a vote of 9 to 3 for life for Bean, and 7 to 5 for death of Woods (R 600-601).

The court, following these recommendations, sentenced Bean to life (R 681) for the murder followed by a consecutive sentence of 30 years for the attempted first degree murder (R 682) and 15 years for the possession of contraband conviction (R 683). The sentences are to be served consecutively (R 683).

The court sentenced Woods to death for the murder (R 653-657) and sentenced him to consecutive 30 years terms for the attempted first degree murder convictions (R 660-663) and 15 years for the possession of contraband conviction (R 663).

In sentencing Woods to death, the court found in aggravation that: (1) Woods was under sentence of imprisonment at the time of the murder; (2) the murder was committed to disrupt or hinder the lawful exercise of any government function or the enforcement of laws (R 654).

The court found in mitigation that Woods was 18 years old (R 655).

Woods appealed his conviction and sentence of death to the Florida Supreme Court. Before Woods filed his initial brief, the Florida Supreme Court granted his motion to relinquish its jurisdiction in his case to reconstruct the record regarding the state's use of peremptory challenges on black veniremen.

The Florida Supreme Court affirmed Wood's conviction and sentence of death. Woods v. State, 490 So.2d 24 (Fla. 1986). For purposes of this petition, they specifically held:

1. Woods had failed to demonstrate a substantial likelihood that the state exercised its peremptory challenges solely on the basis of race.

2. That Woods had not been denied a fair trial when 45 of the 90 spectators in the courtroom during closing argument were prison guards in uniform.

3. That the record, rather than the trial court's sentencing order, justified the disparate sentences given Woods and Bean.

The court denied Wood's subsequent motion for new trial (Appendix B).

STATEMENT OF THE FACTS

Sometime during the morning of May 5, 1983, Correctional Officers Dennard and Anderson counseled with Leonard Bean, an inmate at Union Correctional Institution about disobeying a verbal order that he had received earlier (T 1334). Bean accepted the reprimand without showing any signs of hostility (T 1347). Similarly, another officer had counseled with Woods that day about his refusal to work (T 1701-1703). Woods also did not seem very upset about this reprimand, and the officer did not think Woods was a serious problem when he released him (T 1716-1717).

Shortly before 2:00 p.m. that day inmate Taylor, a white man, overheard inmates Bean and Woods talking with other black inmates (R 1721). In particular, Bean and Woods said that they were tired of being pushed around and were going to "get some crackers back." (T 1722). "Crackers" meant a white person in general and a white correctional officer specifically (T 1737).

Several minutes later, Officers Dennard and Anderson were walking through the main housing unit at UCI (T 1335). They were about 15 feet from the office when Anderson felt something hit him in the back (T 1336). Anderson paried the blow and moved to a nearby office (T 1336). He had to work his way through some inmates, but he finally was pulled inside the office by Officers Rogers and Wilkerson (T 1336).

Meanwhile Bean was stabbing Dennard, and after Anderson was inside the office, Woods also stabbed Dennard (T 1337). Officer Harvey rushed towards Woods and pulled him off Dennard (T 1967). Woods stabbed Harvey (T 1765) and fled. Woods passed another officer, Barker and stabbed him (T 1766). Barker staggered a bit, and Woods took a couple of steps but acted as if he was going to return to Barber. Harvey, however, hollered at Barker and Woods fled (T 1786). Bean by this time had also disappeared.

Shortly thereafter, the prison superintendent and another guard went to cell G-9 (T 1803) where Bean and Woods were found with two other inmates (T 1805). The superintendent told them to come to the cell bars, but before Woods did so, a guard saw him give Bean a knife, and Bean hid it under a blanket (T 1805). Bean and Woods were then arrested, their cells searched, and additional weapons found (T 1809).

A subsequent search of the prison turned up some bloody clothing and an additional knife (T 1851). Because that clothing was not promptly sent away for examination, however, nothing more definite than the blood type of the stains found on the clothing was identified (T 1272-1273).

Dennard died on the operating table as a result of the stab wounds (T 1417).

HOW THE FEDERAL QUESTIONS WAS RAISED AND DECIDED BELOW

I. ISSUE I

Immediately before closing argument, Woods' counsel asked the court to clear the courtroom of the uniformed employees of the Department of Corrections who were present as spectators at the trial:

> MR. BERNSTEIN: Your Honor, we would move to have a portion of the spectators cleared. The basis of the motion is that it is obvious that, en masse, the uniformed correctional officers have come to this trial. We would object to that, Your Honor, in that it impairs a fair and impartial trial of this cause.

(T 2136).

The court said that half of the estimated 90 people in the courtroom were in uniform (T 2138-2139). Nevertheless, the court denied Woods' subsequent motion for mistrial (T 2139).

Woods argued on appeal that he was denied a fair trial because the trial court had not cleared the court of the uniformed corrections employees who were spectators. The Supreme Court rejected that argument (with Justice Shaw dissenting) and it said that Woods received a fair trial.

II. ISSUE II

During voir dire, the prosecution had peremptory challenged six of the nine black verniremen called to serve on Woods' jury. Defense counsel objected to what he perceived to be an impermissible exclusion of black veniremen from serving on the jury solely on account of their race. The court overruled his objection and denied counsel's motion for new trial. On appeal, Woods specifically argued that the prosecutor had deliberately excluded black veniremen solely on account of their race. In State v. Neil, 457 So.2d 481 (Fla. 1984), the Florida Supreme Court rejected the test this Court had articulated in Swain v. Alabama, 380 U.S. 202 13 L.Ed.2d 759, 85 S.Ct. 824 (1965).

The Florida Supreme Court said that Woods had not met the test articulated in Neil. On rehearing, Woods asked the court to reexamine its decision in light of this Court's ruling in Battson v. Kentucky, 476 U.S. ___ 90 L.Ed.2d 69, 106 S.Ct. ___ (1986). That court refused to do so.

III. ISSUE III

In sentencing Woods to death, the trial court found only two statutory aggravating factors applicable to Woods. On appeal, Woods argued that those factors could have applied as well to Woods' codefendant, Bean. By failing to sentence Woods to life in prison as they had done with Bean, Woods argued that the trial court had imposed inconsistent sentences thereby violating the Eighth and Fourteenth Amendments to the United States Constitution. Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976).

On appeal, the Florida Supreme Court rejected that argument. Ignoring the trial court's sentencing order, the Supreme Court found additional non-statutory aggravating factors from the record to distinguish Woods from Bean.

REASONS FOR GRANTING WRIT

FIRST QUESTION PRESENTED

> WHETHER THE PRESENCE OF 45 PRISON EMPLOYEES IN THE SPECTATOR PORTION OF THE COURTROOM, WHICH WAS ONE HALF OF THE TOTAL NUMBER OF SPECTATORS, WAS SO INHERENTLY PREJUDICIAL THAT IT DENIED WOODS A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE WOODS WAS CHARGED WITH MURDERING A PRISON GUARD AND ATTEMPTING TO MURDER THREE OTHER PRISON GUARDS.

This case involved an unusually high amount of community interest. Union County is a small, rural county in north Florida where the state Department of Corrections is a major employer. Union Correctional Institution (UCI) and the Reception Medical Center are large state prisons in Union County, and Florida State Prison in Bradford County is only one or two miles from UCI.

Woods, along with his co-defendant, Bean, were black inmates at UCI when they attacked several white prison guards, killing one and injuring three others. Community reaction to these attacks was high as at least one petition circulated throughout the community calling for increased protection for prison guards (T 917, 1056).

At trial, this interest, especially among the prison employees remained high. Immediately before closing arguments, defense counsel objected to the fact that half or 45 of the 90 spectators in the courtroom were prison guards in uniform. The trial court, however, refused to clear the courtroom of the spectators.

On appeal to the Florida Supreme Court, Woods argued that the trial court denied him a fair trial because it had not excluded these uniformed corrections employees from the courtroom during his trial. The Florida Supreme Court rejected that argument saying:

> Here, we can find no indication that the jury failed to perform its duty properly. We find that the trial court did not err in failing to exclude the complained-about spectators. Woods v. State, 490 So.2d 24, 27 (Fla. 1986).

Justice Shaw, in dissent, said:

> The presence of 45 uniformed corrections officers is, in my mind, no less prejudicial than the presence of 45 friends of a murder victim appearing in mass at the trial of the accused assailant, bearing signs expressing their concerns regarding the outcome of the trial. Exhibitions of this nature have no place in a court of law because of the great possibility of jury intimidation or coersion. Id. at 28.

The issue thus presented to this Court is whether, under the circumstances of Woods' trial, a courtroom half filled with uniformed correctional officers was inherently prejudicial so that Woods was denied his constitutional right to a fair trial. This Court has not faced this precise issue although several cases have dealt with similar issues.

The old case of Frank v. Magnum, 237 U.S. 308, 59 L.Ed. 969 (1914) is the only case somewhat factually similar to this one. In that case, Frank was convicted of murder in Georgia, and upon appeal to this Court by way of a petition for a writ of habeas corpus, he alleged that the crowd watching his trial had been openly hostile. The Georgia Supreme Court noted this disorder amounted only to laughing at an admittedly witty answer by a witness, applauding the result of a colloquy between the prosecutor and defense counsel, and cheering by a crowd outside the courtroom while the jury was being polled.

This Court rejected Frank's claims, saying that there had been no denial of due process of law. This Court, however, said that:

> We are very far from intimating that manifestations of public sentiment, or any other forms of disorder, calculated to influence the court or jury, are matters to be likely treated.

Id. at 336.

In Sheppard v. Maxwell, 384 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507 (1966), this Court reversed Sheppard's conviction for murder because the trial court had not fulfilled

its duty to protect Sheppard from inherently prejudicial publicity which saturated the community, and the court did not control the disruptive influences in the courtroom.

In Cox v. Louisiana, 379 U.S. 559, 13 L.Ed.2d 487, 85 S.Ct. 476 (1965), this Court said that a trial court can restrict conduct which has free speech intermingled with it in order to properly adjudicate controversies. In that case, this Court upheld the facial constitutionality of a state statute prohibiting picketing in or near courthouses.

In justifying the statute as applied, this Court said:

> It is, of course, true that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial. A State may also properly protect the judicial process from being misjudged in the minds of the public. Suppose demonstrators paraded and picketed for weeks with signs asking that indictments be dismissed, and that a judge, completely uninfluenced by these demonstrations, dismissed the indictments. A State may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process. See S Rep No. 732, 81st Cong, 1st Sess, 4.

Id. at 565.

Finally, in Holbrook v. Flynn, 475 U.S. ___ 89 L.Ed.2d 525, 106 S.Ct. ___ (1986), this Court held that the presence of four uniformed and armed guards for security purposes at Holbrook's trial was not so inherently prejudicial that Holbrook was thereby denied his constitutional rights to a fair trial.

These cases obviously are distinguishable from this case, but taken together they express this Court's long standing concern for and close scrutiny of extra judicial activity which a judge or jury may be exposed to during the course of a trial.

Holbrook, being this Court's latest decision in this

area also is the most instructive for this case. In justifying its holding in this case, the Florida Supreme Court said that Woods was not prejudiced because:

> 1. Union County is a small county where uniformed corrections employees are a common sight.
>
> 2. Prospective jurors, on voir dire, indicated that they would follow the evidence and the law in their deliberations and would not be swayed by outside influences.

This Court in Holbrook specifically rejected this last reason:

> The Court of Appeals was correct to find that Justice Giannini's assessment of jurors' states of mind cannot be dispositive here. If "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process," Estes v. Texas, 381 U.S. 532, 542-543 (1965), little stock need be placed in jurors' claims to the contrary. See Sheppard v. Maxwell, 384 U.S. 333, 351-352 (1966); Irvin v. Dowd, 366 U.S. 717, 728 (1961). Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial. Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated but rather whether "an unacceptable risk is presented of impermissible factors coming into play," Estell v. Williams, 425 U.S. 501, 525 (1976).

As to the first reason, this Court made two relevant statements:

> Our society has become inured to the presence of armed guards in most public places. They are doubtless taken for granted so long as their number or weaponry do not suggest particular concern or alarm. (Citation omitted).
>
> * * *
>
> We do not minimize the threat that a room full of uniformed armed policemen might pose to defendant's chances of receiving a fair trial.

Thus, assuming that uniformed corrections employees are a common sight in Union County, the problem presented by this case and suggested by Holbrook is whether a roomful of uniformed corrections employees at the trial of a prisoner charged with killing a corrections employee unfairly influenced the jury with the community's opinion of his guilt. Did the presence of 45 uniformed corrections employees, unlike the four troopers in Holbrook, brand Woods in the jurors' eyes with an unmistakable mark of guilt. Holbrook at 89 L.Ed.2d 536.

This issue has surfaced another context. In State v. Franklin, 327 S.E.2d 449 (W.V. 1985), the West Virginia Supreme Court reversed Franklin's convictions for driving under the influence of alcohol resulting in death because during Franklin's trial, 10 to 30 spectators wore large, bright yellow buttons wearing the word "MAD" (Mothers Against Drunk Driving) on them.

Other scenerios involving other identifiable groups can be imagined. Members of the National Organization for Women wearing "NOW" buttons could attend a trial of a defendant charged with rape. Hasidic Jews could attend a hearing involving state aid to Jewish schools. Blacks could attend a trial involving a white policeman killing a black citizen.

In Cox v. Louisiana, supra, the court was concerned with not only the actual influence of judges and jurors by extra judicial influences but also the appearance of this influence.

Here, the presence of 45 uniformed corrections employees amounted to a statement of the community's belief regarding Woods' guilt and the question presented to this Court was whether their presence was so inherently prejudicial that it denied Woods his constitutional right to a fair trial.

SECOND QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN DENYING WOODS' MOTION FOR MISTRIAL BECAUSE THE PROSECUTOR PEREMPTORILY EXCUSED BLACK PROSPECTIVE JURORS SOLELY BASED UPON THEIR RACE IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

On appeal to the Florida Supreme Court, Woods argued that the prosecutor had peremptorily excused black verniremen from sitting on the jury in this case solely because they were black. The Supreme Court rejected that argument because Woods had not met the standard it had established in State v. Neil, 457 So.2d 481 (Fla. 1984):

> The reconstructed record, however, demonstrates no likelihood of abuse of its peremptory challenges by the state such as would require the trial court to inquire into the state's motive behind excusing these persons.
>
> The transcript of the voir dire shows that one of the people the parties thought had been peremptorily excused had actually been excused for cause. Of the remaining five, two clearly expressed their general reluctance to participating in deciding this case. The three other peremptories exercised against blacks by the state simply do not rise to the level needed under Neil. Woods has failed to demonstrate a substantial likelihood that the state exercised its peremptory challenges solely on the basis of race.

Woods at p.26 (footnotes omitted).

The Supreme Court's opinion in Neil established a two level test a party has to meet when it challenges his advesary's use of peremptory challenges.

> The initial presumption is that peremptories will be exercised in a non-discriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has

> been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue. On the other hand, if the party has acutally been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.

Neil at 486-487.

Based upon this standard the Florida Supreme Court ruled that Woods had not carried his initial burden as he had failed to demonstrate a substantial likelihood that the state exercised its peremptory challenges solely on the base of race.

Woods trial counsel had noticed the prosecutor's use of peremptory challenges because:

> The pattern seemed clear in that out of at least 50 percent of the State's challenges were removing all of the blacks who were seated.
>
> * * *
>
> At the time of the objection I had noticed this pattern of blacks being removed there had been no remarkable statements by the blacks who had been removed in the jury voir dire examination by either side. There were no real extremes.
>
> The one juror who had been removed by Mr. Bean's attorney had worked for the prison system some, I think four years before, so he was acquainted with working for the Department of Corrections and had actually served a guard. And that wasn't that remarkable, but it was the most remarkable of the blacks who had been removed.
>
> And I felt it incumbent on me to bring that to the Court's attention through my objection. And at that time it seemed that there was a pattern of removing blacks from the jury. In fact, all the blacks who were seated there were removed from the jury and we did not have a black citizen serving on that jury. We had one, Ella Jane Perry, who was a woman who was seated as the alternate.

> Q Before I get to Ms. Perry, there wasn't as far as you --
>
> A Excuse me. That was Maybelle Webb that sat as the alternate. Ms. Perry was later challenged by myself.
>
> Q As counsel in this case you could not see any reason other than race for these blacks being excused, is that correct?
>
> A No. There was nothing that I could tell from the questioning and the answers that had been given at the time of the voir dire examination. And it just appeared to be a pattern.
>
> The purpose of the objection was to one, raise the point, preserve the point and the issue and to at that time request the Court to make some further inquiry as to why that pattern appeared to be going on.

(SR 50-52).

Indeed, the state's examination of the veniremen was bland. Typically, it asked individual prospective jurors, black or white, the following questions:

> THE COURT: You may inquire for the State.
>
> MR. TOBIN: May it please the Court.
>
> THE COURT: Mr. Tobin.
>
> MR. TOBIN: Ms. Stewart, do you work outside of the home, ma'am?
>
> PROSPECTIVE JUROR STEWART: Yes.
>
> MR. TOBIN: Where do you work at?
>
> PROSPECTIVE JUROR STEWART: Southern States.
>
> MR. TOBIN: I am sorry.
>
> PROSPECTIVE JUROR STEWART: Southern States Sportswear.
>
> MR. TOBIN: Where is that?
>
> PROSPECTIVE JUROR STEWART: Lake City.
>
> MR. TOBIN: Where?
>
> PROSPECTIVE JUROR STEWART: Lake City.
>
> MR. TOBIN: And are you married, ma'am?
>
> PROSPECTIVE JUROR STEWART: Yes, sir.
>
> MR. TOBIN: What does your husband do?
>
> PROSPECTIVE JUROR STEWART: He is unemployed at the present time.

MR. TOBIN: And do you have any close friends or family with the Department of Corrections?

PROSPECTIVE JUROR STEWART: No, I don't.

MR. TOBIN: Our seating chart got messed up a while ago and, so, I have to look and shuffle around a little bit.

Mr. Fortner, what do you do for a living, sir?

(T 1089-1090).

Whatever other questions he asked of the prospective jurors, he addressed to the panel, and the responses were uniformly the same among the jurors.

In addition, nothing else distinguished these black prospective jurors from their white counterparts. There were black men (T 1226) and black women called, and the women either worked in the home or outside (T 880, 989, 1046). The blacks worked at jobs similar to the whites (T 1090, 1226), and from the record nothing exists to explain why these people were excused other than their race. See People v. Wheeler, 22 Cal.3d 258, 583 P.d 748, 148 Cal. Rptr. 890 (1978). fn. 27.

Of course, the defense voir dire may have revealed reasons for the state peremptory challenge of a prospective juror. In this case, however, the defense examination was almost as bland as the state's. See T 1052-1085.

At the hearing to reconstruct the record regarding how the prosecutor had exercised his peremptory challenges, the state explained the system it had used for rating prospective jurors. Before trial, the prosecutor and two unnamed "public officials" met and "went over each and every juror that was listed in the venire" (SR 25). Then, based upon whether the person had a negative run-in with the law or whether he had strong death penalty convictions (SR 25), the prosecutor rated the person a one, two, or three. A "one" was pro-state, and a "three" was pro-defense (SR 26). A "two" was somewhere in the middle.

As should be expected, the prosecutor was unable to rate

all of the people in the venire, and two of the blacks he excused, Bethea and Stewart, were unrated (SR 38). The remaining blacks were rated a three (SR 37-39) primarily because someone in their family had had a "negative" law enforcement experience.

Stewart and Bethea, however, posed a significant problem for the state on appeal:

> Q So the two unrateds then would have been Joyce Bethea and Glenda Fay Stewart?
>
> A Yes.
>
> Q Do you recall why you peremptorily excused them?
>
> A No.

(SR 40).

Based upon this evidence, the Florida Supreme Court said Woods had not met the burden it had established in Neil, supra.

Since the Florida Supreme Court issued its opinion, this Court issued its opinion in Battson v. Kentucky, 476 U.S. ___ 90 L.Ed.2d 69, 106 S.Ct. ___ (1986). In that case, this Court, like the Florida Supreme Court in Neil, rejected the evidentiary burden that it had established in Swain v. Alabama, 308 U.S. 202, 85 S.Ct. 824 13 L.Ed.2d 759 (1965) for a defendant seeking to challenge the state's use of its peremptory challenges. The burden now required of defendants to carry is only that they show in their respective cases:

> 1. That they are members of a cognizable racial group.
>
> 2. That the prosecutor has exercised peremptory challenges to move from the venire members of the defendant's race.
>
> 3. That from these first two facts eatablished by the defendant and other relevant facts, there is raised an inference that the prosecutor has used peremptory challenges to exclude his veniremen from the petit jury solely on account of their race.

Battson at 90 L.Ed.2d 87-88.

The issue thus presented to this Court is whether the Florida Supreme Court has created a standard more strict than that constitutionally required. If it has, then the retroactivity of Battson becomes an issue.

In Battson, this Court said its decision would not be given retroactive effect and cited State v. Neil, supra, as support. The Florida Supreme Court, however, has given retroactive effect to "pipeline" cases such as this one. See also Andrews v. State, 459 So.2d 1018 (Fla. 1984); Jones v. State, 464 So.2d 547 (Fla. 1985).

Similarly, cases from this Court on other issues have recognized this limited form of retroactivity. Shea v. Louisiana, 470 U.S. ___ 84 L.Ed.2d 38, 105 S.Ct. 1087 (1985); United States v. Payton, 457 U.S. 537, 73 L.Ed.2d 202, 102 S.Ct. 2579 (1982).

This case, therefore, presents a good vehicle for deciding whether "pipeline" cases are controlled by Battson.

THIRD QUESTION PRESENTED

WHETHER THE COURT ERRED IN SENTENCING WOODS TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This case presents a novel issue in the administration of Florida's death penalty law. Leonard Bean, Woods' co-defendant, received a life recommendation from the same jury that recommended death for Woods (R 600-601). The court, following these recommendations sentenced Bean to life and Woods to death (R 653-657, 681). What makes this case unique is the lack of any significant difference between Bean and Woods either as individuals or in the extent of their participation in this murder. Simply put, two men, both mentally defective, participated equally in the killing of a prison guard. Under state law, Tedder v. State, 322 So.2d 908 (Fla. 1975), the trial court could perhaps have justified overriding the jury's life recommendation for Woods and imposed death. See Barclay v. State, 343 So.2d 1266 (Fla. 1977). The court, however, did not do that. Instead, it followed the recommendations of the jury and imposed different sentences upon two defendants who have similar characteristics and who were equally culpable.

In sentencing Woods to death, the trial court found only two aggravating factors applicable to Woods:

> 1. Woods was under sentence of imprisonment at the time of the murder.
>
> 2. Bean and Woods committed the murder to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

(R 655).

The court explicitly rejected all other aggravating factors (R 655), and the sentencing order does not in any way distinguish Bean from Woods, and in fact, it could have applied equally to Bean as well as to Woods.

The dominant theme of the early cases discussing the constitutionality of the death penalty in general, and Florida's death penalty scheme specifically, focused upon

the need for consistency in applying that penalty. For example, in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) Justice Stewart in concurring with the court's ruling that Georgia's death penalty statute was unconstitutional said:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

Id. at 309-310.

Four years later, in Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976) the court reemphasized the need for consistency:

> Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. Mr. Justice White concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and ... there is no meaningful basis for distinguishing the few cases in which it is not." 408 US, at 313, 33 L Ed 2d 346, 92 S Ct 2726 (concurring). ... [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." Id., at 309-310, 33 L Ed 2d 346, 92 S Ct 2726. (Stewart, J., concurring).
>
> Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Similarly, in Pulley v. Harris, 465 U.S. 37, 79 L.Ed.2d 29, 104 S.Ct. 871 (1974), this Court held that proportionality review is not a constitutional requirement, but it also said:

> The joint opinion of Justices Stewart, Powell, and Stevens observed that the Florida scheme, like its Georgia counterpart, requires the sentencer to focus

> on the individual circumstances of each homicide and each defendant. Also, by vesting ultimate sentencing authority in the judge rather than the jury, the statute was expected to yield more consistent sentencing at the trial court level. Only after concluding that trial judges are given specific and detailed guidance to assist them in deciding whether to impose the death penalty did the opinion observe that death sentences are reviewed to ensure that they are consistent with the sentences imposed in similar cases.

Id. at 46 (citations and footnotes omitted).

Likewise, the Florida Supreme Court early on recognized the constitutional requirement of consistency, and it found that Florida's death penalty statute provided this:

> Review by this Court guarantees that the reasons present in one case will reach similar result to that reached under similar circumstances in another case. State v. Dixon, 283 So.2d 1, 10 (1973).

Here, on the face of the trial court's sentencing order, nothing distinguished Woods from Bean. Bean was obviously under sentence of imprisonment at the time of this murder, and the trial court explicitly said Bean and Woods committed the murder to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws (R 655).

On appeal the Florida Supreme Court ignored the trial court's written sentencing order; instead it reviewed the record on appeal to find aggravating reasons to justify Woods' death sentence.

> As stated earlier, the jury recommended that Woods be sentenced to death and that his co-defendant Bean be sentenced to life imprisonment. Woods now claims that the trial court erred in following the jury's recommendation because he and Bean had similar characteristics and were equally culpable. The record, however, belies Woods' claim of equal culpability. Witnesses testified that Woods, rather than Bean, was the homicide victim's prime attacker. Woods, not Bean, told the victim he would die while the victim begged for his life. Woods, not Bean, held the office door shut to prevent other corrections officers from rescuing the victim. Finally, Woods stabbed a

> total of four guards, while Bean attacked only two. The record clearly supports the jury and trial court's disparate treatment of these defendants. See Demps v. State, 395 So.2d 501 (Fla.), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981).

Id. at 47.

The evidence in mitigation for Bean is also similar to that for Woods. Bean, like Woods, had childhood seizures (T 2378) and suffers from neurological brain damage (T 2396). Bean is also borderline retarded (T 2386), and of the two men, Bean is the more brilliant with an IQ of 73 (T 2394).[1] Consequently, both are unable to profit from their past mistakes (T 2395) and have little appreciation for the criminality of their conduct (T 2399).

The Florida Supreme Court's distinction of Woods from Bean, therefore, amounts to a sentencing of Woods to death. Consistency means that if similar defendants commit similar murders, they should receive similar sentences, and from the trial court's sentencing order nothing distinguished Woods from Bean. Yet, the Florida Supreme Court, rather than the trial court, found aggravating factors sufficient to justify imposition of the death penalty.

Justices Stevens and Powell in their concurring opinion in Barclay v. Florida, ___ U.S. ___ 77 L.Ed.2d 1134, 1154, 103 S.Ct.___ (1983) approved the use of non-statutory aggravating factors as long as they were not the sole justification for a death sentence. Here, the Florida Supreme Court created reasons previously unarticulated by any court (and expressly rejected by the trial court (R 655)) or legislative body and applied them to Woods to justify why Woods should die and Bean should live. Not only does this deny Woods his due process right to notice of aggravated factors, see Spinkellink v. Wainwright, 578 F.2d 582 (Ca. 5 1979), it

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[1] The Department of Corrections apparently reported that Bean had an IQ of 60 (T 2396).

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RONALD WOODS,

Petitioner,

STATE OF FLORIDA,

Respondent.

A P P E N D I X

MIC AEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
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Tallahassee, Florida 32302
(904) 488-2458

Attorney for Petitioner

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co-defendant's counsel in *Sublette v. State*, 365 So.2d 775, 778 (Fla. 3d DCA 1978) ("Thus it is the fact of the comment not the source of the comment that effects denial of the right to remain silent.")

The standard by which the impropriety of comments is to be determined was discussed in *Trafficante v. State*, 92 So.2d 811, 814 (Fla.1957).

> In summary, our law prohibits any comment to be made, directly or indirectly, upon the failure of the defendant to testify. This is true without regard to the character of the comment, or the motive or intent with which it is made, if such comment is subject to an interpretation which would bring it within the statutory prohibition and regardless of its susceptibility to a different construction.

The state asserts that the Florida standard amounts to a per se rev[illegible] That is as it should be, so long as an objection is made and the issue is preserved for appeal. *Clark v. State*, 363 So.2d 331 (Fla.1978). The presumption of a defendant's innocence, the state's burden of proving his guilt beyond a reasonable doubt and the defendant's concomitant right to stand mute before his accusers without conceding guilt in any way are fundamental underpinnings of due process. To permit equivocal or indirect comments on the defendant's silence so long as any other reasonable interpretation is possible significantly erodes the protection this state has traditionally afforded its citizens. The state has shown no benefit to the citizens which would outweigh the harm done by receding from the established standard. We, therefore, should decline to do so.

The per se rule has served the citizens of Florida quite well. I am not as optimistic about the new rule that the Court is adopting. I am apprehensive that it is an open invitation to prosecutorial overreaching.

The right to stand mute at trial, free from comment thereon, should not depend on the state of the evidence of the defendant's guilt. I feel that the practical effect of the new rule will be just that.

I would approve the decision of the Fourth District.

OVERTON, J., concurs.



Ronald WOODS, Appellant,

v.

STATE of Florida, Appellee.

No. 44509.

Supreme Court of Florida.

April 24, 1980.

Rehearing Denied July 18, 1980.

Defendant was convicted of first-degree murder and sentenced to death before the Circuit Court, Union County, R.A. Green, J., and defendant appealed. The Supreme Court held that: (1) defendant failed to demonstrate a substantial likelihood that State's peremptory challenges to prospective jurors was based solely on race; (2) trial court did not abuse its discretion in refusing to grant continuance; (3) trial court did not abuse its discretion in failing to exclude uniformed spectators from courtroom; (4) evidence supported trial court's disparate treatment of defendants in sentencing; and (5) trial court did not err in failing to find more mitigation in sentencing defendant to death.

Affirmed.

Shaw, J., dissented and filed opinion.

1. Jury ⇐33(5.1)

Defendant failed to demonstrate a substantial likelihood that the State exercised peremptory challenges to remove prospective jurors solely on the basis of race, so as to require the trial court to inquire into the

would approve the decision of the th District.

/ERTON, J., concurs.

Ronald WOODS, Appellant,

v.

STATE of Florida, Appellee.

No. 64509.

Supreme Court of Florida.

April 24, 1986.

Rehearing Denied July 15, 1986.

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irmed.

ow, J., dissented and filed opinion.

⚭33(5.1)

endant failed to demonstrate a sub- likelihood that the State exercised ory challenges to remove prospec- rs solely on the basis of race, so as re the trial court to inquire into the

State's motive behind excusing these persons.

2. Criminal Law ⚭614(1)

Trial court did not abuse its discretion in refusing to grant a second request for a continuance after granting an earlier continuance, where trial started nine weeks after defendant's original attorney withdrew from representing him and trial court appointed new attorney.

3. Criminal Law ⚭659

Trial court did not abuse its discretion in refusing to exclude from the courtroom uniformed department of correction employees in prosecution for first-degree murder of prison guard.

4. Criminal Law ⚭983

Evidence supported trial court's decision in prosecution for first-degree murder to follow jury's recommendation that defendant be sentenced to death while his codefendant be sentenced to life imprisonment where defendant was the homicide victim's prime attacker and defendant held door shut to prevent rescue of the victim.

5. Criminal Law ⚭986.2(1)

Trial court did not err in failing to find more mitigation in sentencing defendant to death for first-degree murder, despite evidence as to defendant's low intelligence and past life. West's F.S.A. § 921.141(5), (5)(a, g), (6)(g).

Michael E. Allen, Public Defender and David A. Davis, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Lawrence A. Kaden and John M. Koenig, Jr., Asst. Attys. Gen., Tallahassee, for appellee.

PER CURIAM.

Ronald Woods appeals his conviction of first-degree murder and sentence of death. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution. After reviewing this case, we affirm both the conviction and sentence.

Woods and Leonard Bean, both inmates at Union Correctional Institution, stabbed four guards, one of whom died during surgery. The state charged each of them with one count of first-degree murder, three counts of attempted first-degree murder, and possession of contraband (the knives used in the stabbings). In a joint trial the jury convicted both Woods and Bean of first-degree murder and possession of contraband. It also convicted Woods of all three counts of attempted murder,[1] but convicted Bean of only one of those attempts. After the sentencing proceeding, the jury recommended that Woods be sentenced to death and that Bean receive a sentence of life imprisonment. The trial court agreed with the recommendations and sentenced the defendants accordingly.

[1] During voir dire, one of Woods' attorneys objected to the state's use of its peremptory challenges to remove black prospective jurors. The court overruled the objection, and jury selection and trial continued. A full year after the completion of the trial, but before we heard this appeal, this Court filed its opinion in *State v. Neil*, 457 So.2d 481 (Fla.1984). In *Neil* we held that a party may be required to state the basis for exercising peremptory challenges. Woods filed a motion asking this Court to relinquish jurisdiction in order to reconstruct the record regarding the *Neil* issue.[2] The reconstructed record, however,

1. Woods does not appeal his other convictions and sentences. Our review of the record, however, shows them to be amply supported by the evidence, and we therefore affirm them.

2. We held in *Neil* that that case would not be applied retroactively because of the difficulty presented by incomplete records and reliance on former standards. Our reversal in *Andrews v. State*, 459 So.2d 1018 (Fla.1984), should not be seen as a retreat from that stand because the record in *Andrews* met the *Neil* criteria. Woods objected to the state's conduct, and, in our discretion, we allowed reconstruction of the record because the court reporter had not recorded and transcribed the bench conferences where the sides exercised their peremptories. Even now this record is the bare minimum we would expect from one seeking review of the *Neil* issue on appeal, i.e., a timely objection to the system

demonstrates no likelihood of abuse of its peremptory challenges by the state such as would require the trial court to inquire into the state's motive behind excusing these persons.

At trial Woods' attorney made a single objection to the state's exercise of its peremptory challenges. This occurred after the state had used ten peremptories. Defense counsel contended that six of those had been exercised against blacks and that the state had "removed every black that was on this jury." The reconstructed record shows this claim to be not exactly correct because at that time Bean's attorney had excused one of the first six blacks.

Voir dire in this case extended through nine black prospective jurors. On the reconstructed record the parties agreed that the state exercised peremptory challenges against six of the nine, Bean and Woods' excused one each, and the ninth served as an alternate juror. In *Neil* we stated that "'exclusion of a significant number of black potential jurors ... will be insufficient, in and of itself, to warrant reversal of a trial court's determination not to make inquiry.'" 457 So.2d at 486, *quoting People v. Thompson*, 79 A.D.2d 87, 111, 435 N.Y.S.2d 739, 755 (1981). This is so because the reasons for excusing such persons may have been readily apparent to the judge and others in attendance at the voir dire. *Id.* Such is the case here.

The transcript of the voir dire shows that one of the people the parties thought had been peremptorily excused had actually been excused for cause.[3] Of the remaining five, two clearly expressed the general reluctance to participating in deciding this case.[4] The three other peremptories exercised against blacks by the state simply do not rise to the level needed under *Neil*. Woods has failed to demonstrate a substantial likelihood that the state exercised its peremptory challenges solely on the basis of race.[5]

[2] The public defender initially represented both Woods and Bean after their arrest in June 1983. In July the public defender's office withdrew from representing Woods, and the trial court appointed a new lawyer for him. The trial started nine weeks later. After granting one continuance, the trial court refused to continue the case again, and Woods now claims that this constituted unnecessary speed which denied him a fair trial because his defense could not be prepared adequately.

Granting or not granting a continuance is within a trial court's discretion. *Lusk v. State*, 446 So.2d 1038 (Fla.), *cert. denied*, — U.S. —, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984); *Williams v. State*, 438 So.2d 781 (Fla.1983), *cert. denied*, 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 145 (1984); *Jent v. State*, 408 So.2d 1024 (Fla.1981), *cert. denied*, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). A trial court's ruling on a continuance will not be disturbed unless an abuse of discretion is shown. *Jent*. Woods has demonstrated no such abuse here. The trial court granted Woods' first motion for a continuance, but refused the next one. Woods' counsel argued that he needed more time to investigate the possibility of an inmate group's having coerced Woods into attacking the victims. A prison investigation, however, had never connected Woods to that group, and counsel's contentions amount to nothing more than conjecture and speculation. This case is a far cry from *Valle v. State*, 394 So.2d 1004 (Fla.1981), where counsel had only twenty-four days to prepare for trial, and our review of the record reveals no abuse of discretion here.

[3] A number of department of corrections employees attended this trial dressed

atic excusal of blacks and an identification of the number of and names of those struck.

3. The state challenged Watkins for cause. She responded affirmatively when the trial court asked her: "You would not be a fair juror?" Defense counsel did not object to her excusal.

4. Not wanting a reluctant juror is not evidence of discrimination.

5. The state also used peremptory challenges against seven white prospective jurors.

...87 challenges solely on the basis

...he public defender initially repre-...oth Woods and Bean after their ... June 1983. In July the public ...s office withdrew from represent-...is, and the trial court appointed a ...er for him. The trial started nine ...ter. After granting one continu-... trial court refused to continue the ...n, and Woods now claims that this ...d unnecessary speed which de-...a fair trial because his defense ...be prepared adequately.

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...umber of department of correc-...oyees attended this trial dressed ...

...ing a reluctant juror is not evidence ...mation.

...e also used peremptory challenges ...on white prospective jurors.

in their uniforms. Just prior to closing argument Woods' counsel asked the trial court to clear the courtroom of the uniformed spectators. The court refused that request, and Woods now argues that the presence of these uniformed employees intimidated the jury, thereby denying him a fair trial.

In making this argument Woods relies on *State v. Gens*, 107 S.C. 448, 93 S.E. 139 (1917), *United States v. Rios Ruiz*, 579 F.2d 670 (1st Cir.1978), and *State v. Franklin*, 327 S.E.2d 449 (W.Va.1985). In *Gens* the South Carolina Supreme Court reversed Gens' conviction of transporting liquor because, during trial, several women had held up large posters condemning liquor before the jury. In *Rios Ruiz* the first circuit upheld the trial court's asking three uniformed policemen to leave the courtroom during the trial of a policeman accused of beating two persons while arresting them.[6] In *Franklin* West Virginia's Supreme Court reversed Franklin's conviction for driving under the influence of alcohol resulting in death because the local sheriff, president of the local Mothers Against Drunk Driving (MADD) chapter, and ten to thirty spectators wore large, bright yellow MADD buttons while attending the trial.

Courts have the inherent power to preserve order in the courtroom, to protect the rights of the parties, and to further the interests of justice. *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (Fla.1982). Excluding spectators, in effect closing a trial, is largely a matter of discretion with the court, *see Bundy v. State*, 455 So.2d 330 (Fla.1984), but the primary aim in such an exclusion is to preserve the defendant's rights. *Bundy*; *Green v. State*, 135 Fla. 17, 184 So. 504 (1938). Here, although the question is close, we find no likelihood of prejudice or intimidation sufficient to demonstrate an abuse of discretion in the trial court's failure to exclude the uniformed spectators.

6. On appeal Rios Ruiz claimed that removing these three spectators denied him a fair and public trial.

Union is a small county. Given the number of prisons in that locality, uniformed corrections employees are a commonplace sight. Uniformed spectators caused no disruption, although they had apparently been present throughout this trial. On voir dire the prospective jurors indicated that they would follow the evidence and the law in their deliberations and would not be swayed by outside influences. In some instances the mere presence of certain persons may be intimidating. *Franklin*; *Rios Ruiz*. Such is not always the case, however. *Compare State v. Richey*, 298 S.E.2d 879 (W.Va.1982) (high school students need not be excluded from watching trial of man accused of raping one of their classmates). Here, we can find no indication that the jury failed to perform its duty properly. We find that the trial court did not err in failing to exclude the complained-about spectators.

[4] As stated earlier, the jury recommended that Woods be sentenced to death and that his co-defendant Bean be sentenced to life imprisonment. Woods now claims that the trial court erred in following the jury's recommendation because he and Bean had similar characteristics and were equally culpable. The record, however, belies Woods' claim of equal culpability. Witnesses testified that Woods, rather than Bean, was the homicide victim's prime attacker. Woods, not Bean, told the victim he would die while the victim begged for his life. Woods, not Bean, held the office door shut to prevent other corrections officers from rescuing the victim. Finally, Woods stabbed a total of four guards, while Bean attacked only two. The record clearly supports the jury and trial court's disparate treatment of these defendants. *See Demps v. State*, 395 So.2d 501 (Fla.), *cert. denied*, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981).

[5] As his final point on appeal, Woods argues that the trial court failed to consider unrebutted nonstatutory mitigating evi-

dence regarding Woods' low intelligence and his past life.' That the trial court did not articulate how he considered and analyzed the mitigating evidence is not necessarily an indication that he failed to do so. We do not require that trial courts use "magic words" when writing sentencing findings, and we recognize that some findings are inartfully drafted. *Davis v. State*, 461 So.2d 67 (Fla.1984), *cert. denied*, — U.S. —, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985). The trial court did not restrict the presentation of mitigating evidence, and we find no indication in the findings of fact that the court ignored that evidence. We find no error in the trial court's failure to find more in mitigation in this case. *See Stano v. State*, 473 So.2d 1282 (Fla.1985).

Our review shows Woods' convictions and sentences to be supported by the record. We therefore affirm them.

It is so ordered.

BOYD, C.J., and ADKINS, OVERTON, McDONALD and EHRLICH, JJ., concur.

SHAW, J., dissents with an opinion.

SHAW, Justice, dissenting.

I would reverse the conviction on the basis that the presence of approximately forty-five corrections officers in uniform, approximately half the public in attendance during closing argument to the jury, effectively denied appellant a fair trial. The state concedes that this Court has already recognized that Union County is a small county and that many of the citizens of that county either work for the Department of Corrections or are related to such workers. *Lusk v. State*, 446 So.2d 2d 1038 (Fla.), *cert. denied*, — U.S. —, 105 S.Ct. 229, 83 L.Ed.2d 163 (1984), and *Straight v. State*, 415 So.2d 6 (Fla.), *cert. denied*, — U.S. 1066, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982).

Appellant does not argue that the presence of uniformed corrections officers amounts to per se reversible error. His argument is that under the unique circumstances of this case, the presence of such a large number of uniformed officers at the most emotionally charged stage of the trial amounted to an abuse of judicial discretion. I agree.

An accused is entitled to a trial before an impartial jury unaffected by outside forces and influences. The presence of forty-five uniformed corrections officers is, in my mind, no less prejudicial than the presence of forty-five friends of a murder victim appearing en masse at the trial of the accused assailant, bearing signs expressing their concerns regarding the outcome of the trial. Exhibitions of this nature have no place in a court of law because of the great possibility of jury intimidation or coercion. Having denied appellant's motion for a change of venue, the trial court assumed the heavy burden of ensuring that the fairness of the trial was not compromised by the venue and the deep public interest in the trial. I am persuaded that the trial judge abused his discretion in not requiring the removal of the uniformed corrections officers, and that in the interest of justice a new trial should be granted.*

I agree with the majority's analysis and disposition of the other issues raised.



7. The trial court found the following aggravating circumstances under § 921.141(5), Fla.Stat. (1983): 1) committed by person under sentence of imprisonment, § 921.141(5)(a); and 2) committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws, § 921.141(5)(g). We find these aggravating factors amply supported by the record. The trial court found Woods' age (19 years) to be a mitigating circumstance. § 921.141(6)(g).

* Fla.R.App. P. 9.140(f):

Scope of Review. The court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.

IN THE SUPREME COURT OF FLORIDA

RONALD WOODS,	:	
Appellant,	:	
v.	:	CASE NO. 64,509
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

MOTION FOR REHEARING

Pursuant to Rule 9.330, Florida Rules of Appellate Procedure, the appellant, RONALD WOODS, asks this Honorable Court to rehear his case. Woods v. State, Case No. 64,509 Florida opinion filed April 24, 1986. As grounds for this motion, he alleges that this Court has either overlooked or misapprehended the law or facts applicable to his case as follows:

THE NEIL ISSUE

1. On page 3 of its opinion, this Court said:

> Woods has failed to demonstrate a substantial likelihood that the state exercised its peremptory challenges solely on the basis of race (footnote omitted).

Woods concludes that this Court is holding that he has failed to meet the standard required to establish the prima facie case required by this Court in State v. Neil, 457 So.2d 481 (Fla. 1984).

2. Since this Court issued its opinion, the United States Supreme Court issued its opinion in Battson v. Kentucky, Case No. 84-6263, opinion filed April 30, 1986, 39 Cr.L.Rptr. 3061. In that case, the U.S. Supreme Court rejected the evidentiary burden that it had established in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824 13 L.Ed.2d 759 (1965) for a defendant seeking to challenge the state's use of its peremptory challenges. The burden now required of defendants to carry is only that they show in their respective cases:

> 1. That they are members of a cognizable racial group.

> 2. That the prosecutor has exercised peremptory challenges to move from the venire members of the defendant's race.
>
> 3. That from these first two facts established by the defendant and other relevant facts, there is raised an inference that the prosecutor has used peremptory challenges to exclude his veniremen from the pettit jury solely on account of their race.

39 Cr.L.Rptr. at 3066.

Accordingly, the U.S. Supreme Court's burden of proof to establish a prima facie case of racial discrimination in the choice of pettit jurors is much less than what this Court established in its opinion in Neil.

3. In light of this easier standard, Woods asks this Honorable Court to reconsider its opinion on this issue in his case. Specifically, Woods asks this Court to reconsider the following facts argued by Woods in his initial brief and which under Battson would raise an inference of the state's impermissible use of peremptory challenges by the prosecutor in this case:

> 1. The prosecutor conducted a bland voir dire. Initial brief at p. 12-14. See Battson at 39 Cr.L.Rptr. 3066 ("Similarly, the prosecutor's questions and statements during voir dire examination ... may support or refute an inference of discriminatory purpose").
>
> 2. The black veniremen had backgrounds indistinguishable from white veniremen. Initial brief at p. 14-15.
>
> 3. The state cannot explain why it had excused two black veniremen (supplemental record at 40).

SPECTATORS IN THE COURTROOM

1. On page 5 of its opinion, this Court rejected Woods claim that the presence of 45 uniformed Department of Corrections employees in the spectator section of the courtroom during Woods trial created a "likelihood of prejudice or intimidation sufficient to demonstrate an abuse of discretion in the trial court's failure to exclude the uniformed spectators." In support of this ruling, this Court said that:

> a. Union County is a small county where uniformed corrections employees are a common sight.

> b. Prospective jurors, on voir dire, indicated that they would follow the evidence of law in their deliberations and would not be swayed by outside influences.

2. As to the first fact found by this Court, this Court has overlooked the fact that while the presence of uniformed corrections employees may be a common sight in Union County, they are not a common sight in such large numbers at jury trials. Moreover, this Court has overlooked the fact that there must have been some organized effort to have so many corrections employees appear in uniform at Woods' trial during normal working hours. See State v. Richey, 298 S.E.2d 879, 881 (W.V. 1982) (no evidence existed of collusion in procuring the appearance at trial of high school classmates of rape victim.)

3. As to the jurors' indications that they would not be swayed by outside influences, this Court has overlooked what the United States Supreme Court recently said in Holbrook v. Flynn, Case No. 84-1606, opinion filed March 26, 1986, 38 Cr.L.Rptr. 3217, 3220:

> The Court of Appeals was correct to find that Justice Giannini's assessment of jurors' states of mind cannot be dispositive here. If "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process," Estes v. Texas, 381 U.S. 532, 542-543 (1965), little stock need be placed in jurors' claims to the contrary. See Sheppard v. Maxwell, 384 U.S. 333, 351-352 (1966); Irvin v. Dowd, 366 U.S. 717, 728 (1961). Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial. Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether " an unacceptable risk is presented of impermissible factors coming into play," Estell v. Williams, 425 U.S. 501, 525 (1976).

THE DEATH SENTENCE

1. Woods is confused about this Court's holding regarding Woods' sentence of death. On page 6 of its opinion, this Court said:

> The record clearly supports the jury and trial court's disparate treatment of these two defendants.
>
> * * *
>
> That the trial court did not articulate how he considered and analyzed the mitigating evidence is not necessarily an indication that he failed to do so.

2. The confusion arises from this Court's apparent misapprehension of the purpose of the trial court's sentencing order.

3. This Court in State v. Dixon, 283 So.2d 1, 8 (Fla. 1972), said that sentencing orders should be in writing to provide meaningful review:

> The fourth step required by Fla.Stat. §921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute.

4. In Mann v. State, 420 So.2d 578 (Fla. 1982), this Court said:

> The trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found.... 420 So.2d at 581.

In Mann, even though the trial court at least mentioned the unrebutted mitigating evidence in its sentencing order, this Court said that the sentencing order was not unmistakably clear regarding whether the trial court found any mitigation. Here, the trial court did not even mention the unrebutted

mitigating evidence. It is, thus, at best ambiguous whether it considered the evidence or not, and this Court can only speculate that it did so. In any event, the order does not have the unmistakable clarity required by Mann, and Woods is honestly confused about what this Court demands in sentencing orders.

5. This confusion is compounded by the fact that that the facts of this Court found in justifying the disparity between Woods' death and Bean's life sentences were not found by the trial court. That is, the facts this Court said on pages 5-6 of its opinion which distinguish Woods from Bean were not found by the trial court. While these facts may have supported other aggravating factors, the trial court did not think so, as it specifically rejected the existence of other aggravating factors (R 655). By refusing to be limited by the trial court's order imposing death and being willing to examine the record to justify the death sentence, this Court is no longer reviewing a death sentence, but it is assisting the trial court in its imposition of it. See Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981).

6. Appellate counsel in arguing against the errors in a sentencing order must now anticipate any possible argument that this Court might use that can be gleaned from the record to support a trial court's sentence of death. In this case, this Court "ambushed" appellate counsel by finding reasons not found by the trial court to justify the imposition of Woods' death sentence.

Therefore, Woods respectfully asks this Court to rehear his case and either remand for a new trial or reduce his sentence of death to a sentence of life imprisonment without parole for a period of 25 years.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General John M. Koenig, The Capitol, Tallahassee, Florida, 32302, this 2/ day of May, 1986.

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Attorney for Appellant

IN THE SUPREME COURT OF FLORIDA

FRIDAY, JULY 18, 1986

RONALD WOODS,	**	
Appellant,	**	CASE NO. 64,509
vs.	**	Circuit Court Case No. 83-81-CF (Union County)
STATE OF FLORIDA,	**	
Appellee.	**	

On consideration of the motion for rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

McDONALD, C.J., ADKINS, BOYD, OVERTON and EHRLICH, JJ., Concur
SHAW, J., Dissents

2nd JUDICIAL CIRCUIT

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Chief Deputy Clerk

cc: Hon. Margie Cason, Clerk
Hon. R. A. Green, Jr., Judge

David A. Davis, Esquire
John M. Koenig, Esquire

EDITOR'S NOTE

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NO. 86-5542

Supreme Court, U.S.
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RONALD WOODS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

JIM SMITH
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QUESTIONS PRESENTED

I. WHETHER THE MERE PRESENCE OF A NUMBER OF DEPARTMENT OF CORRECTIONS EMPLOYEES IN THE SPECTATOR PORTION OF THE COURTROOM DEPRIVED PETITIONER OF A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHERE PETITIONER WAS CHARGED WITH FIRST DEGREE MURDER OF A PRISON GUARD AND ATTEMPTED MURDER OF THREE OTHER PRISON GUARDS.

II. WHETHER THE STATE'S USE OF PEREMPTORY CHALLENGES IN EXCUSING BLACK PROSPECTIVE JURORS FROM THE VENIRE DENIED PETITIONER EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

III. WHETHER THE TRIAL COURT ERRED IN SENTENCING PETITIONER TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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PRELIMINARY STATEMENT

Ronald Woods, the criminal defendant and petitioner below, will be referred to herein as Petitioner. The State of Florida, the prosecution and respondent below, will be referred to herein as Respondent. Attached hereto is an appendix containing the opinion of the Florida Supreme Court and other pertinent documents. Citations to the appendix will be indicated parenthetically as "A" with the appropriate page number(s). Citations to the petition for writ of certiorari will be indicated parenthetically as "P" with the appropriate page number(s).

OPINION BELOW

Petitioner seeks review of the Florida Supreme Court's opinion approving the convictions and sentences imposed by the trial court, including a sentence of death. The opinion is reported as Woods v. State, 490 So.2d 24 (Fla. 1986).

JURISDICTION

Petitioner seeks review pursuant to 28 U.S.C. § 1257(3). The judgment below was entered on April 24, 1986, and Petitioner's motion for rehearing was denied on July 18, 1986. The instant petition bears a date of service on September 16, 1986. This Court has jurisdiction only to the extent that it finds a substantial federal question is presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions relevant to the questions raised herein are found in the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case as stated on pages one, two, and three of the petition as being accurate to the extent stated. Respondent disagrees, however, with Petitioner's interpretation of the Florida Supreme Court's holdings below and, therefore, would restate the holdings for purposes of this petition as follows:

As to question two presented below, the court found "no likelihood of prejudice or intimidation sufficient to demonstrate an abuse of discretion in the trial court's failure to exclude the uniformed spectators" which were present during closing arguments. Woods v. State at 27. Contrary to Petitioner's assertion, the court did not make a finding that half of the spectators in the courtroom were prison guards in uniform, although similar estimates were alluded to at trial (R 2130, 2138-39).

Regarding the Florida Supreme Court's holding as to question three, the court specifically concluded that "[t]he record supports the jury and trial court's disparate treatment of these defendants. See Demps v. State, 395 So.2d 501 (Fla.), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981)." Woods v. State at 27.

Respondent accepts the recitation of facts as set forth in the opinion below, Woods v. State, 490 So.2d 24 (Fla. 1986), and included in the Appendix attached hereto. Respondent wishes to point out that after Petitioner's notice of appeal was filed, the Florida Supreme Court entered an order remanding the case to the trial court to hold a hearing to determine "how many of the black veniremen were peremptorily challenged and excused by the State." (SR 8). That hearing was held on January 4, 1985. Upon conclusion, the trial court stated that he didn't believe the instructions on remand were for him to make a determination of racial discrimination under the prevailing law in Florida, State v. Neil, 457 So.2d 481 (Fla. 1984). However, the trial court then stated that the "record speaks for itself for the testimony of the two witnesses and the stipulation of counsel. Were I called upon to make a finding, it

would be one of no discrimination." (SR 54). Other facts relevant to the disposition of the petition will be included in the argument portion of this brief as they relate to the questions presented.

WHY THE WRIT SHOULD NOT ISSUE

QUESTION I

WHETHER THE MERE PRESENCE OF A NUMBER OF DEPARTMENT OF CORRECTIONS EMPLOYEES IN THE SPECTATOR PORTION OF THE COURTROOM DEPRIVED PETITIONER OF A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHERE PETITIONER WAS CHARGED WITH FIRST DEGREE MURDER OF A PRISON GUARD AND ATTEMPTED MURDER OF THREE OTHER PRISON GUARDS.

Petitioner contends this Court should grant review in this case to determine "whether, under the circumstances of Woods' trial, a courtroom half filled with uniformed correctional officers was inherently prejudicial so that Woods was denied his constitutional right to a fair trial." (P 8) Petitioner has not attempted in any way to establish that this case presents a substantial federal question which merits the exercise of this Court's jurisdiction. Rather than even attempting to demonstrate the Florida Supreme Court determined an important federal constitutional question in the instant case, Petitioner is merely seeking review to determine whether the Supreme Court of Florida correctly decided whether, under the totality of circumstances, he received a fair trial. Rule 17 of the rules of this Court and Ross v. Moffitt, 417 U.S. 600, 616-617, 41 L.Ed.2d 341. 354-355, 94 S.Ct. 2437 (1974), make it clear that such review is not the function of the Writ of Certiorari. See also: Stern & Gressman, Supreme Court Practice (5th Ed. 1978) pp. 254-317.

Petitioner suggests that he did not receive a fair trial as guaranteed by the Constitution as the mere presence of the uniformed corrections employees in the courtroom amounted to a statement of the community's belief regarding Petitioner's guilt.

Nowhere in the petition is it shown that the Florida Supreme Court has decided a federal question in a way in conflict with an applicable decision of this Court.

Respondent agrees with Petitioner that this Court's recent decision in Holbrook v. Flynn, 475 U.S. ___, 89 L.Ed.2d 525, 106 S.Ct. ___ (1986), is the most instructive for this case (P 9-10)

and further submits that it is dispositive of this issue. However, there is no assertion that the decision rendered by the Supreme Court of Florida collides with this Court's decision in Holbrook.

In Holbrook, the question presented was whether a criminal defendant was denied his constitutional right to a fair trial when, at his trial with five co-defendants, the customary courtroom security force was supplemented by four uniformed and armed state troopers sitting in the first row of the spectator section. This Court held that such presence was not inherently prejudicial. 89 L.Ed.2d at 534. Here, Petitioner has failed to demonstrate, much less allege, any actual prejudice visited upon him.

The circumstances in the instant case demonstrate a much less likelihood of prejudice than in Holbrook. Sub judice, the officers complained of were merely Department of Corrections employees who were unarmed and evenly dispersed among civilians in the unfilled spectators gallery (R 2129-2130). Moreover, the trial court indicated that "many of the uniformed persons in the courtroom . . . are persons who testified in their uniforms during the course of the trial." (R 2130) The record further demonstrates that the assembly of the prison employees did not occur until just prior to closing arguments (R 2125, 2127). Thus, it is rather obvious that Petitioner is merely asserting that the decision below is erroneous and is, therefore, asking this Court to review the circumstances of his case in light of this Court's decision in Holbrook.

Petitioner has fallen woefully short of demonstrating any actual prejudice sufficient to constitute a deprivation of his constitutional right to a fair trial and, therefore, this Court should refuse to grant further review of this issue.

QUESTION II

WHETHER THE STATE'S USE OF PEREMPTORY CHALLENGES IN EXCUSING BLACK PROSPECTIVE JURORS FROM THE VENIRE DENIED PETITIONER EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Florida Supreme Court, after notice of appeal had been filed, remanded this case to the trial court so it could hold a hearing to determine how many of the black veniremen were peremptorily challenged and excused by the State. This hearing was held on January 4, 1985, at which time it was determined that voir dire extended through nine black prospective jurors. Of those nine the State peremptorily challenged five, and one for cause: the defense exercised peremptory challenges against two; and one served as an alternate juror. Woods at 26. It was further established that three of the five blacks peremptorily excused by the State were unacceptable because they were found to have had a problem with local law enforcement (SR 26). The prosecutor was unable to recall why he peremptorily excused the other two jurors (SR 40). Although not directed to do so, the trial court found that there was no discrimination in the State's use of its peremptory challenges (SR 54). On direct appeal, the Florida Supreme Court likewise found that Petitioner had failed to demonstrate a substantial likelihood that the State exercised its peremptory challenges solely on the basis of race. Woods at 26. The court's holding was based on the standard established in State v. Neil, 457 So.2d 481 (Fla. 1984) which was accurately set forth in the petition (P 12). Petitioner is now asking this Court to determine whether the Florida Supreme Court has created a standard more strict than that constitutionally required under this Court's recent decision in Batson v. Kentucky, 476 U.S. ___, 90 L.Ed.2d 69, 106 S.Ct. ___ (1986) which was decided one week after the decision below (P 15).

The State submits that the retroactivity of Batson does not become an issue here and is irrelevant as it is clear from the record that the dictates of Batson have been followed in this cause.

In Batson, this Court remanded the case to the trial court for a determination of purposeful discrimination which is precisely the same action undertaken by the Florida Supreme Court sub judice.

Petitioner fails to demonstrate how the standard set forth by the Florida Supreme Court in Neil, supra, is any more strict than the burden now required of defendants pursuant to Batson, supra. He merely requests this Court to review the correctness or erroneousness of the decision below, which, as stated above, is not the focus of this Court's exercise of its certiorari jurisdiction. Ross v. Moffitt, supra.

Having failed to assert or demonstrate conflict with Batson or any other applicable decision of this Court, Petitioner has failed to present herein a substantial federal question meriting discretionary review by this Court.

QUESTION III

WHETHER THE TRIAL COURT ERRED IN SENTENCING PETITIONER TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner concedes that the death penalty is proper in this case but contends that, based on the weight of the evidence, the trial court should have overridden the jury's life recommendation and likewise sentenced his co-defendant to death (P 17). In effect, the Petitioner asks this Honorable Court to substitute its own findings of fact for those of the trial judge and jury. It is respectfully submitted that certiorari review does not exist to allow continuous reargument regarding the weight of the evidence. Sumner v. Mata, 455 U.S. 51, 71 L.Ed.2d 480, 102 S.Ct. 1303 (1982); United States v. Johnson, 268 U.S. 220, 45 S.Ct. 496 (1925).

Mr. Woods complains that two different sentences were imposed upon two defendants who have similar characteristics and who were equally culpable. Relying on cold transcripts, he asks this Court to reweigh the evidence in mitigation for co-defendant Bean as being similar to that for Woods but at no time does he challenge the propriety of the trial court's order sentencing him to death. Petitioner fails to address the recognized prohibition against "reweighing evidence on appeal." See Tibbs v. State, 397 So.2d 1120 (Fla. 1982), 457 U.S. 31, 72 L.Ed.2d 652, 102 S.Ct. 2211 (1982). Petitioner argues that the Florida Supreme Court erroneously considered non-statutory aggravating factors as justification for the death sentence and then asks this Court to reconsider the evidence in mitigation in order to justify similar sentences. However, as Petitioner recognized, this Court in Barclay v. Florida, 463 U.S. 939, 77 L.Ed.2d 1134, 103 S.Ct. 3418 (1983), approved the use of non-statutory aggravating factors as long as they were not the sole justification for a death sentence. Here, there were other valid statutory aggravating factors (R 655). Moreover, an individualized determination on the basis of the character of the individual and the crime is important in determining whether to impose a death sentence. 463 U.S. at 958.

Nevertheless, misapplication of state law, had any occurred, does not constitute grounds for a federal constitutional claim. Wainwright v. Goode, 464 U.S. 78, 78 L.Ed.2d 187, 104 S.Ct. 378 (1983); Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955 (1962); Gryger v. Burke, 334 U.S. 728, 92 L.Ed. 1683 (1948).

Finally, Petitioner is asking this Court to engage in comparative proportionality review of his death sentence, which this Court has refused to do. See Pulley v. Harris, 465 U.S. 37, 79 L.Ed.2d 29, 104 S.Ct. 871 (1984). Certiorari should not be granted.

co-defendant's counsel in *Sublette v. State*, 365 So.2d 773, 778 (Fla. 3d DCA 1978) ("Thus it is the fact of the comment not the source of the comment that effects denial of the right to remain silent.")

The standard by which the impropriety of comments is to be determined was discussed in *Trafficante v. State*, 92 So.2d 811, 814 (Fla.1957).

> In summary, our law prohibits any comment to be made, directly or indirectly, upon the failure of the defendant to testify. This is true without regard to the character of the comment, or the motive or intent with which it is made, if such comment is subject to an interpretation which would bring it within the statutory prohibition and regardless of its susceptibility to a different construction.

The state asserts that the Florida standard amounts to a per se reversal rule. That is as it should be, so long as proper objection is made and the issue is preserved for appeal. *Clark v. State*, 363 So.2d 331 (Fla.1978). The presumption of a defendant's innocence, the state's burden of proving his guilt beyond a reasonable doubt and the defendant's concomitant right to stand mute before his accusers without conceding guilt in any way are fundamental underpinnings of due process. To permit equivocal or indirect comments on the defendant's silence so long as any other reasonable interpretation is possible significantly erodes the protection this state has traditionally afforded its citizens. The state has shown no benefit to the citizens which would outweigh the harm done by receding from the established standard. We, therefore, should decline to do so.

The per se rule has served the citizens of Florida quite well. I am not so optimistic about the new rule that the Court is adopting. I am apprehensive that it is an open invitation to prosecutorial overreaching.

The right to stand mute at trial, free from comment thereon, should not depend on the state of the evidence of the defendant's guilt. I feel that the practical effect of the new rule will be just that.

I would approve the decision of the Fourth District.

OVERTON, J., concurs.



Ronald WOODS, Appellant,

v.

STATE of Florida, Appellee.

No. 64509.

Supreme Court of Florida.

April 24, 1986.

Rehearing Denied July 18, 1986.

Defendant was convicted of first-degree murder and sentenced to death before the Circuit Court, Union County, R.A. Green, J., and defendant appealed. The Supreme Court held that: (1) defendant failed to demonstrate a substantial likelihood that State's peremptory challenges to prospective jurors was based solely on race; (2) trial court did not abuse its discretion in refusing to grant continuance; (3) trial court did not abuse its discretion in failing to exclude uniformed spectators from courtroom; (4) evidence supported trial court's disparate treatment of defendants in sentencing; and (5) trial court did not err in failing to find more mitigation in sentencing defendant to death.

Affirmed.

Shaw, J., dissented and filed opinion.

1. Jury ⇐33(5.1)

Defendant failed to demonstrate a substantial likelihood that the State exercised peremptory challenges to remove prospective jurors solely on the basis of race, so as to require the trial court to inquire into the

State's motive behind excusing those persons.

2. Criminal Law ⇐614(1)

Trial court did not abuse its discretion in refusing to grant a second request for a continuance after granting an earlier continuance, where trial started nine weeks after defendant's original attorney withdrew from representing him and trial court appointed new attorney.

3. Criminal Law ⇐630

Trial court did not abuse its discretion in refusing to exclude from the courtroom uniformed department of correction employees in prosecution for first-degree murder of prison guard.

4. Criminal Law ⇐662

Evidence supported trial court's decision in prosecution for first-degree murder to follow jury's recommendation that defendant be sentenced to death while his codefendant be sentenced to life imprisonment where defendant was the homicide victim's prime attacker and defendant held door shut to prevent rescue of the victim.

5. Criminal Law ⇐986.2(1)

Trial court did not err in failing to find more mitigation in sentencing defendant to death for first-degree murder, despite evidence as to defendant's low intelligence and past life. West's F.S.A. § 921.141(5), (5)a, g), (6)g).

Michael E. Allen, Public Defender and David A. Davis, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Lawrence A. Kaden and John M. Koenig, Jr., Asst. Attys. Gen., Tallahassee, for appellee.

PER CURIAM.

Ronald Woods appeals his conviction of first-degree murder and sentence of death. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution. After reviewing this case, we affirm both the conviction and sentence.

Woods and Leonard Bean, both inmates at Union Correctional Institution, stabbed four guards, one of whom died during surgery. The state charged each of them with one count of first-degree murder, three counts of attempted first-degree murder, and possession of contraband (the knives used in the stabbings). In a joint trial the jury convicted both Woods and Bean of first-degree murder and possession of contraband. It also convicted Woods of all three counts of attempted murder,[1] but convicted Bean of only one of those attempts. After the sentencing proceeding, the jury recommended that Woods be sentenced to death and that Bean receive a sentence of life imprisonment. The trial court agreed with the recommendations and sentenced the defendants accordingly.

[1] During voir dire, one of Woods' attorneys objected to the state's use of its peremptory challenges to remove black prospective jurors. The court overruled the objection, and jury selection and trial continued. A full year after the completion of the trial, but before we heard this appeal, this Court filed its opinion in *State v. Neil*, 457 So.2d 481 (Fla.1984). In *Neil* we held that a party may be required to state the basis for exercising peremptory challenges. Woods filed a motion asking this Court to relinquish jurisdiction in order to reconstruct the record regarding the *Neil* issue.[2] The reconstructed record, however,

1. Woods does not appeal his other convictions and sentences. Our review of the record, however, shows them to be amply supported by the evidence, and we therefore affirm them.

2. We held in *Neil* that that case would not be applied retroactively because of the difficulty presented by incomplete records and reliance on former standards. Our reversal in *Andrews v. State*, 459 So.2d 1018 (Fla.1984), should not be seen as a retreat from that stand because the record in *Andrews* met the *Neil* criteria. Woods objected to the state's conduct, and, in our discretion, we allowed reconstruction of the record because the court reporter had not recorded and transcribed the bench conferences where the sides exercised their peremptories. Even now this record is the bare minimum we would expect from one seeking review of the *Neil* issue on appeal, i.e., a timely objection to the system

demonstrates no likelihood of abuse of its peremptory challenges by the state such as would require the trial court to inquire into the state's motive behind excusing these persons.

At trial Woods' attorney made a single objection to the state's exercise of its peremptory challenges. This occurred after the state had used ten peremptories. Defense counsel contended that six of those had been exercised against blacks and that the state had "removed every black that was on this jury." The reconstructed record shows this claim to be not exactly correct because at that time Bean's attorney had excused one of the first six blacks.

Voir dire in this case extended through nine black prospective jurors. On the reconstructed record the parties agreed that the state exercised peremptory challenges against six of the nine, Bean and Woods excused one each, and the ninth served as an alternate juror. In *Neil* we stated that "'exclusion of a significant number of black potential jurors ... will be insufficient, in and of itself, to warrant reversal of a trial court's determination not to make inquiry.'" 457 So.2d at 486, *quoting People v. Thompson*, 79 A.D.2d 87, 111, 435 N.Y.S.2d 739, 755 (1981). This is so because the reasons for excusing such persons may have been readily apparent to the judge and others in attendance at the voir dire. *Id.* Such is the case here.

The transcript of the voir dire shows that one of the people the parties thought had been peremptorily excused had actually been excused for cause.[4] Of the remaining five, two clearly expressed their general reluctance to participating in deciding this case.[5] The three other peremptories exercised against blacks by the state simply do not rise to the level needed under *Neil*. Woods has failed to demonstrate a substantial likelihood that the state exercised its peremptory challenges solely on the basis of race.[6]

[2] The public defender initially represented both Woods and Bean after their arrest in June 1983. In July the public defender's office withdrew from representing Woods, and the trial court appointed a new lawyer for him. The trial started nine weeks later. After granting one continuance, the trial court refused to continue the case again, and Woods now claims that this constituted unnecessary speed which denied him a fair trial because his defense could not be prepared adequately.

Granting or not granting a continuance is within a trial court's discretion. *Lusk v. State*, 446 So.2d 1038 (Fla.), *cert. denied*, — U.S. —, 105 S.Ct. 259, 83 L.Ed.2d 158 (1984); *Williams v. State*, 438 So.2d 781 (Fla.1983), *cert. denied*, 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 146 (1984); *Jent v. State*, 408 So.2d 1024 (Fla.1981), *cert. denied*, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). A trial court's ruling on a continuance will not be disturbed unless an abuse of discretion is shown. *Jent*. Woods has demonstrated no such abuse here. The trial court granted Woods' first motion for a continuance, but refused the next one. Woods' counsel argued that he needed more time to investigate the possibility of an inmate group's having coerced Woods into attacking the victims. A prior investigation, however, had never connected Woods to that group, and counsel's contentions amount to nothing more than conjecture and speculation. This case is a far cry from *Valle v. State*, 394 So.2d 1004 (Fla.1981), where counsel had only twenty-four days to prepare for trial, and our review of the record reveals no abuse of discretion here.

[3] A number of department of corrections employees attended the trial dressed

4. The state challenged Watkins for cause. She responded affirmatively when the trial court asked her: "You would not be a fair juror." Defense counsel did not object to her excusal for cause. The record reflects no likelihood of abuse of its peremptory challenges by the state such as would require the trial court to inquire into the state's motive behind excusing these persons. At trial, Woods' attorney made a single objection to the state's exercise of its peremptory challenges. This occurred after the state had used ten peremptories. Defense counsel contended that six of those had been exercised against blacks and that the state had "removed every black that was on this jury." The reconstructed record shows this claim to be not exactly correct because at that time Bean's attorney had excused one of the first six blacks. Voir dire in this case extended through nine black prospective jurors. On the reconstructed record the parties agreed that the state exercised peremptory challenges against six of the nine, Bean and Woods excused one each, and the ninth served as an alternate juror. In *Neil* we stated that "'exclusion of a significant number of black potential jurors ... will be insufficient, in and of itself, to warrant reversal of a trial court's determination not to make inquiry.'" 457 So.2d at 486, *quoting People v. Thompson*, 79 A.D.2d 87, 111, 435 N.Y.S.2d 739, 755 (1981). This is so because the reasons for excusing such persons may have been readily apparent to the judge and others in attendance at the voir dire. *Id.* Such is the case here. The transcript of the voir dire shows that one of the people the parties thought had been peremptorily excused had actually been excused for cause.[4] Of the remaining five, two clearly expressed their general reluctance to participating in deciding this case.[5] The three other peremptories exercised against blacks by the state simply do not rise to the level needed under *Neil*. Woods has failed to demonstrate a substantial likelihood that the state exercised its peremptory challenges solely on the basis of race.[6]

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5. The state challenged Watkins for cause. She responded affirmatively when the trial court asked her: "You would not be a fair juror." Defense counsel did not object to her excusal for cause. The record reflects no likelihood of abuse of its peremptory challenges by the state such as would require the trial court to inquire into the state's motive behind excusing these persons.

6. Not counting a reluctant juror is not evidence of discrimination.

in their uniforms. Just prior to closing argument Woods' counsel asked the trial court to clear the courtroom of the uniformed spectators. The court refused that request, and Woods now argues that the presence of these uniformed employees intimidated the jury, thereby denying him a fair trial.

In making this argument Woods relies on *Blair v. Goss*, 107 S.C. 440, 90 S.E. 130 (1917), *United States v. Rios Ruiz*, 579 F.2d 670 (1st Cir.1978), and *State v. Franklin*, 227 S.E.2d 449 (W.Va.1985). In *Goss* the South Carolina Supreme Court reversed Goss' conviction of transporting liquor because, during trial, several women had held up large posters condemning liquor before the jury. In *Rios Ruiz* the first circuit upheld the trial court's asking three uniformed policemen to leave the courtroom during the trial of a policeman accused of beating two persons while arresting them.[6] In *Franklin* West Virginia's Supreme Court reversed Franklin's conviction for driving under the influence of alcohol resulting in death because the local sheriff, president of the local Mothers Against Drunk Driving (MADD) chapter, and ten to thirty spectators wore large, bright yellow MADD buttons while attending the trial.

Courts have the inherent power to preserve order in the courtroom, to protect the rights of the parties, and to further the interests of justice. *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (Fla.1982). Excluding spectators, in effect closing a trial, is largely a matter of discretion with the court, *see Bundy v. State*, 455 So.2d 330 (Fla.1984), but the primary aim in such an exclusion is to preserve the defendant's rights. *Bundy*; *Green v. State*, 135 Fla. 17, 184 So. 504 (1938). Here, although the question is close, we find no likelihood of prejudice or intimidation sufficient to demonstrate an abuse of discretion in the trial court's failure to exclude the uniformed spectators.

Unlike in a small county, Given the number of prisons in that locality, uniformed corrections employees are a commonplace sight. Uniformed spectators caused no disruption, although they had apparently been present throughout this trial. On voir dire the prospective jurors indicated that they would follow the evidence and the law in their deliberations and would not be swayed by outside influences. In some instances the mere presence of certain persons may be intimidating. *Franklin*; *Rios Ruiz*. Such is not always the case, however. *Compare State v. Bishop*, 388 S.E.2d 670 (W.Va.1982) (high school students need not be excluded from watching trial of man accused of raping one of their classmates). Here, we can find no indication that the jury failed to perform its duty properly. We find that the trial court did not err in failing to exclude the complained-about spectators.

[4] As stated earlier, the jury recommended that Woods be sentenced to death and that his co-defendant Bean be sentenced to life imprisonment. Woods now claims that the trial court erred in following the jury's recommendation because he and Bean had similar characteristics and were equally culpable. The record, however, belies Woods' claim of equal culpability. Witnesses testified that Woods, rather than Bean, was the homicide victim's prime attacker. Woods, not Bean, told the victim he would die while the victim begged for his life. Woods, not Bean, held the office door shut to prevent other corrections officers from rescuing the victim. Finally, Woods stabbed a total of four guards, while Bean attacked only two. The record clearly supports the jury and trial court's disparate treatment of these defendants. *See Demps v. State*, 395 So.2d 501 (Fla.), *cert. denied*, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981).

[5] As his final point on appeal, Woods argues that the trial court failed to consider unrebutted nonstatutory mitigating evi-

6. On appeal Rios Ruiz claimed that removing these three spectators denied him a fair and public trial.

[illegible] Woods' low intelligence and his past life.[1] That the trial court did not articulate how he considered and analyzed the mitigating evidence is not necessarily an indication that he failed to do so. We do not require that trial courts use "magic words" when writing sentencing findings, and we recognize that some findings are inartfully drafted. *Downs v. State*, 453 So.2d 47 (Fla.1984), cert. denied, — U.S. —, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985). The trial court did not restrict the presentation of mitigating evidence, and we find no indication in the findings of fact that the court ignored that evidence. We find no error in the trial court's failure to find more in mitigation in this case. *See Shere v. State*, 473 So.2d 1282 (Fla.1985).

Our review shows Woods' convictions and sentences to be supported by the record. We therefore affirm them.

It is so ordered.

BOYD, C.J., and ADKINS, OVERTON, McDONALD and EHRLICH, JJ., concur.

SHAW, J., dissents with an opinion.

SHAW, Justice, dissenting.

I would reverse the conviction on the basis that the presence of approximately forty-five corrections officers in uniform, approximately half the public in attendance during closing argument to the jury, effectively denied appellant a fair trial. The state concedes that this Court has already recognized that Union County is a small county and that many of the citizens of that county either work for the Department of Corrections or are related to such workers. *Engle v. State*, 446 So.2d 52, 53 (Fla.), cert. denied, — U.S. —, 105 S.Ct. 228, 83 L.Ed.2d 160 (1984), and *Morgan v. State*, 415 So.2d 6 (Fla.), cert. denied, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982).

Appellant does not argue that the presence of uniformed corrections officers amounts to per se reversible error. His argument is that under the unique circumstances of this case, the presence of such a large number of uniformed officers at the most emotionally charged stage of the trial amounted to an abuse of judicial discretion. I agree.

An accused is entitled to a trial before an impartial jury unaffected by outside forces and influences. The presence of forty-five uniformed corrections officers is, in my mind, no less prejudicial than the presence of forty-five friends of a murder victim appearing en masse at the trial of the accused assailant, bearing signs expressing their concern regarding the outcome of the trial. Exhibitions of this nature have no place in a court of law because of the great possibility of jury intimidation or coercion. Having denied appellant's motion for a change of venue, the trial court assumed the heavy burden of ensuring that the fairness of the trial was not compromised by the venue and the deep public interest in the trial. I am persuaded that the trial judge abused his discretion in not requiring the removal of the uniformed corrections officers, and that in the interest of justice a new trial should be granted.*

I agree with the majority's analysis and disposition of the other issues raised.



1. The trial court found the following aggravating circumstances under § 921.141(5): Felon[illegible] (1981); 2) committed by person under sentence of imprisonment; § 921.141(5)(a); and 3) committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws, § 921.141(5)(g). We find these aggravating factors amply supported by the record. The trial court found Woods' age (18 years) to be a mitigating circumstance. § 921.141(6)(g).

* Fla.R.App.P. 9.140(f):

> Scope of Review. The court shall review all rulings and orders appearing of the record necessary to pass upon the grounds of an appeal. In the interest of justice the court may grant any relief to which any party is entitled. In capital cases the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not sufficiency of the evidence is an issue presented for review.

86-554.

also evidences that the Florida Supreme Court did not conduct, in this case, the proportionality review this Court in Barclay found so important. Barclay, supra, 77 L.Ed.2d at 1149.

Rarely does a case come along where two defendants are so similar in so many ways yet receive so widely differing sentences. This case presents a good vehicle to further explain the consistency requirement so important in death penalty cases and whether the review in court can impose a death sentence.

CONCLUSION

The petitioner, Ronald Woods, respectfully asks this Honorable Court to grant his petition and issue a writ of certiorari.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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Attorney for Petitioner

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SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. Mail to the Honorable Joseph F. Spaniol, Jr., Clerk of the Supreme Court of the United States, First and Maryland Avenue, Northeast, Washington, D.C. 20543; Mr. Ronald Woods, #064857, Post Office Box 747, Florida Sate Prison, Starkes, Florida, 32091; and by hand delivery to the Honorable Sid White, Clerk, Supreme Court of Florida, Tallahassee, Florida, 32301, and to Assistant Attorney General John M. Koenig, The Capitol, Tallahassee, Florida, this 1st day of September, 1986.

DAVID A. DAVIS
Assistant Public Defender

86-5542

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

Case No. _____

RECEIVED
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SUPREME COURT, U.S.

RONALD WOODS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

AFFIDAVIT OF FILING BY FIRST CLASS UNITED STATES MAIL PURSUANT TO RULE 28.2

CAME AND APPEARED BEFORE ME, the undersigned authority DAVID A. DAVIS, Assistant Public Defender, Attorney for petitioner, who first being duly sworn, deposes and says:

That on September 16, 1986, he placed in a United States Post Office Box, with first class postage prepaid, an original of the Petition for Writ of Certiorari to the Florida Supreme Court in the above-referenced case, and said Petition was duly and properly addressed to the Clerk of the United States Supreme Court. Further, he is a duly sworn and authorized member of the Bar of this Court.

DAVID A. DAVIS
Assistant Public Defender
Attorney for Petitioner

STATE OF FLORIDA
COUNTY OF LEON

SWORN TO AND SUBSCRIBED to before me this 16th day of September, 1986, at Tallahassee, Leon County, Florida.

NOTARY PUBLIC, State of Florida

My Commission Expires:

[CORRECTED ORDER]

SUPREME COURT OF THE UNITED STATES

RONALD WOODS *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 86–5542. Decided November 10, 1986

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Florida Supreme Court insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). Even if I believed, however, that the death penalty could constitutionally be imposed under certain circumstances, petitioner's youth and mental condition preclude imposition of a sentence of death under the requirements of the Eighth Amendment.

Petitioner Ronald Woods was convicted of first-degree murder and sentenced to death in connection with the stabbing of a guard at the Union Correctional Institution, at which Woods was an inmate. The Florida Supreme Court affirmed petitioner's conviction and death sentence. 490 So. 2d 24 (1986). Woods was 18 years old at the time of his trial. *Id.*, at 28, n. 7. The evidence submitted to the trial court in mitigation of sentence showed that petitioner had suffered seizures in childhood, and had sustained brain damage. Pet. for Cert. 20. Petitioner's IQ is reported to be below 73, within the borderline range of mental retardation. *Ibid.*

I believe that the imposition of capital punishment for crimes committed by juveniles is unconstitutionally cruel punishment forbidden by the Eighth Amendment. "Although '[c]rimes committed by youths may be just as harmful to victims as those committed by older persons, . . . they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.'" *Roach* v. *Aiken*, —— U. S. —— (1986) (BRENNAN, J., dissenting) (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders,

Confronting Youth Crime 7 (1978); see also *Eddings* v. *Oklahoma*, 455 U. S. 104, 115–116 (1982). These considerations are particularly compelling where, as here, the offender's mental capacities are organically impaired. While the trial court treated petitioner's youth as a mitigating circumstance, it did not consider whether petitioner's mental retardation, or the combination of his youth and mental incapacity, presented a circumstance that might foreclose application of the death penalty.

The execution of a mentally retarded child in retribution for a crime committed at or before the age of 18 cannot, in my judgment, be reconciled with the requirements of the Eighth Amendment, or with our fundamental commitment to the preservation of human rights. I would grant the petition for certiorari.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, dissenting.

In view of the presence in the courtroom throughout the trial of a substantial number of uniformed guards (up to as many as 45) and the trial court's denial of petitioner's request to clear the courtroom of uniformed spectators, and the failure of the Supreme Court of Florida in its opinion, see 490 So. 2d 24, 26–27 (1986), even to cite this Court's then recent decision in *Holbrook* v. *Flynn*, —— U. S. —— (1986), I would grant the petition for certiorari, vacate the judgment below, and remand the case to the Supreme Court of Florida for reconsideration in light of *Holbrook*.